1996

State of Utah v. Betty Basta : Brief of Appellee

Utah Court of Appeals

Richard G. Uday; Attorney for Appellant.
Kris C. Leonard; Assistant Attorney General; Jan Graham; Utah Attorney General; Ernie W. Jones; Deputy District Attorney; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 960507-CA
v.	:	
BETTY BASTA,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-103 (1995); AND INSURANCE FRAUD, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-521 (1995), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING

KRIS C. LEONARD (4902)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

RICHARD G. UDAY
356 East 900 South
Salt Lake City, Utah 84111

Attorney for Appellant

Ernie W. Jones
Deputy District Attorney, Salt Lake Cnty

Attorneys for Appellee

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P. O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

RICHARD G. UDAY
356 East 900 South
Salt Lake City, Utah 84111

Attorney for Appellant

Ernie W. Jones
Deputy District Attorney, Salt Lake Cnty

Attorneys for Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTION AND NATURE OF PROCEEDINGS 1

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

SUMMARY OF THE ARGUMENTS 13

ARGUMENT

I. DEFENDANT'S FAILURE TO TIMELY TAKE REASONABLE STEPS TO MITIGATE THE CLAIMED PREJUDICE OR TO INVESTIGATE THE PLEA BARGAIN UPON HER PRE-TRIAL DISCOVERY OF IT PREVENTS CONSIDERATION OF THIS CLAIM; ALTERNATIVELY, SHE ESTABLISHES NO PREJUDICE, AND SHE FAILS TO PROVE THAT MELDRUM GAVE FALSE TESTIMONY, CONDEMNING HER RELATED CLAIM OF PROSECUTORIAL MISCONDUCT 14

A. Reversal Is Not Warranted Because Defendant Failed To Pursue All Reasonable Means To Mitigate The Claimed Prejudice, And Failed To Establish The Constitutional Materiality Of The Undisclosed Information. 16

1. Utah Rule of Criminal Procedure 16 17

2. The Federal Constitution 20

a. Meldrum's testimony comports with the plea agreement 22

b. Harmless error 28

B. Because Meldrum Gave No False Testimony About The Theft Plea, The Prosecutor's Closing Argument Asserting Meldrum's Credibility Did Not Constitute Prosecutorial Misconduct 29

II. WHERE THE WIRING WAS NEITHER CONSTITUTIONALLY MATERIAL NOR CLEARLY EXCULPATORY, THE FACT THAT IT WAS PRESERVED ONLY IN PHOTOGRAPH FORM DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS 31

III. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY TO THIS CASE 38

CONCLUSION 40

ADDENDA

Addendum A. Utah Code Ann. § 76-6-103 (1995)
Utah Code Ann. § 76-6-521 (1995)

Addendum B. Trial Court's Ruling on Defendant's Post-Trial Motions (R. 1068, 1087-88)

Addendum C. Floor Plans of 916 E. Peach Blossom Drive

Addendum D. Unofficial Transcript of Plea Colloquy in Theft Case (R. 180-82)

Addendum E. Utah R. Crim. P. 16

Addendum F. Partial Cross-Examination of Meldrum on Plea Bargain Issue (R. 464-78)

Addendum G. Prosecutor's Closing Argument (partial) (R. 994-95, 1034)

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) 21

California v. Trombetta, 467 U.S. 492, 104 S. Ct. 2533 (1984) 32

United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976) 21, 22

STATE CASES

Codianna v. Morris, 660 P.2d 1101 (Utah 1983) 21, 22, 27, 29

Parsons v. Barnes, 871 P.2d 516 (Utah), cert. denied, 513 U.S. 966 (1994) 39

Rasmussen v. Sharapata, 895 P.2d 391 (Utah App. 1995) 39

Salt Lake City v. Emerson, 861 P.2d 443 (Utah App. 1993) 32, 37

State v. Alonzo, 932 P.2d 606 (Utah App.),
cert. granted, 940 P.2d 1224 (Utah 1997) 39

State v. Christofferson, 793 P.2d 944 (Utah App. 1990) 18, 20

State v. Cummins, 839 P.2d 848 (Utah App. 1992),
cert. denied, 853 P.2d 897 (Utah 1993) 30

State v. Dunn, 850 P.2d 1201 (Utah 1993) 39

State v. Griffiths, 752 P.2d 879 (Utah 1988) 2, 18

State v. Harrison, 805 P.2d 769 (Utah App.),
cert. denied, 817 P.2d 327 (Utah 1991) 2

State v. Hay, 859 P.2d 1 (Utah 1993) 30

State v. Horton, 848 P.2d 708 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993) .. 17

State v. Humphrey, 793 P.2d 918 (Utah App. 1990) 2, 21, 32

State v. Kallin, 877 P.2d 138 (Utah 1994) 2, 18, 20

State v. Knight, 734 P.2d 913 (Utah 1987) 2, 17, 18

State v. Mickelson, 848 P.2d 677 (Utah App. 1992) 2, 17, 18, 20

State v. Montoya, 937 P.2d 145 (Utah App. 1997) 31

State v. Nebeker, 657 P.2d 1359 (Utah 1983) 21, 32

State v. Shaffer, 725 P.2d 1301 (Utah 1986) 21, 22, 32, 37

State v. Smith, 776 P.2d 929 (Utah App. 1989) 20

State v. Tillman, 750 P.2d 546 (Utah 1987) 20

STATE STATUTES

Utah Code Ann. § 76-6-103 (1995) 1, 3

Utah Code Ann. § 76-6-521 (1995) 1, 3

Utah Code Ann. § 78-2a-3 (1996) 1

Utah R. App. P. 23B 4

Utah R. App. P. 24 31

Utah R. Crim. P. 16 ..... 3, 17

Utah R. Crim. P. 30 20

Utah R. Evid. 609 26

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and conviction of aggravated arson, a first degree felony, in violation of Utah Code Ann. § 76-6-103 (1995); and insurance fraud, a second degree felony, in violation of Utah Code Ann. § 76-6-521 (1995).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1.(A) Is reversal warranted where, despite the State's failure to disclose details of a plea bargain between itself and one of its expert witnesses in an unrelated matter, defendant discovered the plea agreement well before trial, obtained copies of the police reports and docket sheet, extensively questioned the witness about the plea at trial, and,

only after a guilty verdict was rendered, approached the trial court to seek relief from the discovery violation?

The appellate court must determine as a matter of law whether a discovery violation occurred and, if so, must review the trial court's ruling on the discovery issue for an abuse of discretion. State v. Knight, 734 P.2d 913, 916-18 (Utah 1987); State v. Mickelson, 848 P.2d 677, 687 (Utah App. 1992). Defendant waived appellate review of his claim of a violation of state discovery rules by failing to take appropriate steps below to mitigate any potential prejudice from the alleged discovery violation. State v. Kallin, 877 P.2d 138, 143 (Utah 1994); State v. Griffiths, 752 P.2d 879, 882-83 (Utah 1988); Mickelson, 848 P.2d at 691.

(B) Did the prosecutor commit reversible error when he implied in closing that the expert had no bias arising from the plea he entered in an unrelated matter, consistent with the testimony the expert gave on the stand?

When reviewing a claim of prosecutorial misconduct, this Court will reverse the conviction only if the prosecutor's statements are improper and prejudicial. State v. Harrison, 805 P.2d 769, 786 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991); State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990).

2. Is reversal warranted where a section of electrical wiring disappeared after the fire marshal had inspected it but before any other expert could inspect it, given the fact that the fire marshal rejected the wiring as a possible cause of the fire, and two of the

remaining three experts also ruled out the wiring as a possible cause of the fire based on other evidence gleaned in their on-site inspections?

Appellate review of this issue is governed by the review stated in issue 1, supra, for a discovery violation.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in or appended to this brief, including:

Utah Code Ann. § 76-6-103 (1995);

Utah Code Ann. § 76-6-521 (1995); and

Utah R. Crim. P. 16.

STATEMENT OF THE CASE

Defendant was charged with aggravated arson, a first degree felony, in violation of Utah Code Ann. § 76-6-103 (1995); and insurance fraud, a second degree felony, in violation of Utah Code Ann. § 76-6-521 (1995) (R. 6-9) (copies of these statutes are attached in addendum A). Following a four-day trial, a jury convicted her as charged (R. 92, 95-98, 141-42). Defendant filed two post-trial motions for arrest of judgment or for a new trial, arguing that the State failed in its duty to preserve certain wiring, that the State failed to disclose the details of a plea agreement it had in an unrelated criminal matter involving one of its witnesses in this case, and that the State knowingly relied on

allegedly perjured testimony about the plea agreement (R. 152-77). Following a hearing and arguments, the trial court denied the motions and ordered defendant to undergo a 60-day evaluation (R. 205, 211-14, 1068, 1087-88) (a copy of the verbal rulings is attached in addendum B). Thereafter, the court sentenced defendant to the Utah State Prison for five-years-to-life for aggravated arson, and one-to-fifteen years for insurance fraud, stayed the concurrent sentences, and put defendant on thirty-six months probation (R. 240-41). Defendant timely appealed to the Utah Supreme Court, which poured the case over to this Court by order dated July 31, 1996 (R. 267).

New counsel appeared for defendant on appeal and sought a temporary remand under Utah Rule of Appellate Procedure 23B, seeking to supplement the record on claims of ineffective assistance of trial counsel (R. 1111-28). This Court granted the remand, and an evidentiary hearing was held on July 7, 1997 (R. 1151-52). The trial court found no evidence to support the various claims of ineffective assistance (R. 1153-56), and the issues addressed on remand have not been raised in defendant's brief. Aplt.'s Br. at 7.

STATEMENT OF FACTS

At 9:37 a.m. on Saturday, February 11, 1995, a fire crew was dispatched to fight an active residential fire at 916 Peach Blossom in Sandy, Utah (R. 333-34). The home was a split-level home, and the fire had blown out windows in the front of the house and generated a heavy plume of smoke visible to the firefighters before they arrived (R. 334-35, 365-66). Two crews immediately advanced through the front doors with hoses, one

of which headed upstairs (R. 336).[1] David Durrant led his crew to the lower level where he manned the nozzle of their hose (R. 336, 364, 366-67). They were greeted by blinding smoke and billowing heat (R. 366, 378). Durrant reached the bottom of the stairs, shooting bursts of water in front of him in order to see the next few steps (R. 365, 367). Upon reaching the bottom level, he discovered that the bulk of flame was to his left (R. 367). Believing that the main fire was burning in a closet under the stairs, he turned his hose on that area, only to find that the fire in that area was a "quick, hot fire" which "knocked down just instantly as soon as I hit it with a little bit of water." (R. 369-70). He noted at trial that the studs in the closet had started scorching but "were not really far involved," that it took only "a couple quick squirts" to douse the fire, and that the stairs which formed the ceiling of the closet "were very solid" and had not been structurally undermined by the fire in the closet (R. 369, 373, 376, 380).

Durrant rapidly discovered that the "seat" or the heart of the fire was four-to-eight feet into the family room, which shared a common wall with the closet (R. 368-72, 376, 381, 387).[2] The fire in the family room was "f[u]rther involved" than the one in the

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[1]The difficulty defendant notes with a hose involved only the crew fighting the fire on the upper level (R. 383). The hydrant problem caused no delay in fighting the fire because the crews "had plenty of water in the engine" which they used while others relayed water from a second hydrant (R. 383-84). Further, the hydrant worked fine a day earlier when defendant's husband used it (R. 764-65).

[2]The east wall of the closet was the west wall of the family room (R. 381, 505, 701-02). That wall was of 2 x 4 construction with sheetrock and wood paneling on the family room side only (R. 381, 387). Two floor plans are attached in addendum C.

closet, and took twenty to thirty minutes of hard fighting before the firefighters could claim any kind of control (R. 368-70, 385-86). The crew put out fire burning on several cardboard boxes in the middle of the room on the floor and noted numerous other cardboard boxes around the perimeter of the room, consistent with defendant's claim that the room had stored numerous boxes of home decorating items at the time of the blaze (R. 378, 386, 425, 500, 772).

Once the fire was extinguished, Durrant took time to examine the scene, largely for safety reasons (R. 380). Based on his experience with the fire, his review of the depth of char[3] in various parts of the lower level, his observations of the damage and burn patterns, and his extensive training and experience, he determined that the fire burned from the family room toward the closet and the stairwell (R. 370-80).[4]

Sandy City Fire Marshal Dave Meldrum arrived on the scene around 10:30 a.m. (R. 403, 407-08). His responsibility was to investigate the fire and determine both cause and origin (R. 407). In doing so, Meldrum was trained to assume that the fire was an accident and then to proceed to examine all possible accidental causes to see if they could be excluded as causes in this instance (R. 414). Meldrum noted that most of the damage

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[3]Char is the burnt residue resulting from flame and heat impinging on an object (R. 753-54).

[4]Durrant explained that the depth of char in the closet "was not near as great" as that in the family room immediately above where he believed the seat of the fire to be (R. 372, 380).

was confined to the basement family room (R. 409). However, one-half hour into his investigation, he was informed that there had been a fire the previous afternoon (R. 409-10). Around 2:30 p.m. on Friday, defendant's husband Robert Basta had discovered smoke and flames in the closet under the stairs (R. 760-61). Instead of calling the fire department, he retrieved a garden hose from the back yard, attached it to a fire hydrant outside, and poured a sufficient amount of water into the closet to soak the contents and to warp the top of the closet door (R. 563, 764-66, 787). The fire had started and burned on the west side of the closet opposite the wall shared with the family room (R. 760-61, 778). Mr. Basta hauled the damaged items into the back yard (R. 346).

With this information in mind, Meldrum concentrated on the closet, specifically thinking about the possibility that the Friday closet fire had rekindled to cause the Saturday fire (R. 409, 417-18).[5] He looked at the items burned in the Friday fire and determined that the fire was small--Mr. Basta confirmed as much (R. 417-18, 554-55). He examined the closet carefully, noting that there were still numerous items in the closet which remained unburned after the Saturday fire but would likely have been totally consumed had the fire begun in the closet, and that the stairwell was not as heavily

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[5]While at the scene of the fire, Meldrum voiced an initial belief that the fire might be a rekindle of the Friday fire (R. 556-60, 588-89). However he did not finish his investigation of the fire until several days later, by which time he made his final determination that this was not a rekindle but was an intentionally-set fire (R. 416, 560, 576). Such a change during the course of an investigation is normal (R. 580).

damaged as would be expected if the source of the fire was in the closet (R. 418-19). Meldrum spent 1½ to 2 hours examining the electrical system in the area of the fire, including removing part of the wiring from the common wall between the closet and the family room (R. 414-16, 440-42, 595).[6] However, he ultimately eliminated electricity as a cause of the fire, in part because he found the wiring to be pliable instead of brittle as it would have been had it caused the fire, and he saw nothing in the wiring to be inconsistent with having simply been exposed to the heat and flames which burned around it (R. 416, 440-42, 444, 569).[7]

Ultimately, Meldrum eliminated all possible accidental causes, finding that the fire was intentionally set (R. 416-17, 421-22). He determined an "area" of origin, as opposed to a "point" of origin: between three and five feet from the west wall of the family room (R. 412-13). He felt the cause was likely a flame intentionally applied to items stored in the room, noting the complete absence of any indication of an accelerant having been

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[6]Meldrum removed the wiring from the common wall to more closely examine it, and ultimately left it on a blue garbage can in the basement (R. 444, 595). Defendant's twenty-three-year-old son testified that he saw Meldrum and another fireman put the wiring in a fire truck (R. 756, 806).

[7]Defendant claims that the State's witnesses put the origin of the fire "on the floor of the basement family room directly in front of a common wall shared with the stairwell closet." Aplt.'s Br. at 9. However, he makes this statement in the middle of a paragraph talking about the Friday fire. Id. The evidence established that the Friday fire started in the closet near the floor on the wall opposite the common wall with the family room (R. 760-61, 778). The prosecution's witnesses put the origin of the Saturday fire away from the common wall (R. 413, 748-49, 751, 875-76).

used (R. 423-25). He theorized that the fire traveled, in part, from its area of origin, through the family room door into the hallway, then attacked the door to the closet (R. 419, 433-34, 449, 513). Meldrum's investigation suggested that the fire approached the closet from outside, breaching it in two ways: 1) through the closed door, burning it from the top down; and 2) through the common wall, again burning from the top down (R. 419-20, 427-28, 5200-21, 524-28). Meldrum's decision was based on the following factors:

--various burn patterns and "V" patterns indicating the direction from which the fire came (R. 427-28, 433-34, 524);

--the fact that the sheetrock remaining on the family room side of the common wall was not burned on the closet side (R. 429);

--various damage to wood and screws in the common wall which was more noticeable on the family room side of the wall than the closet side (R. 445);

--sheetrock remaining on the family room side of the common wall were not burned on the closet side (R. 429);

--the remaining char was considerably deeper in the family room than in the closet (R. 447-48);

--evidence that the fire in the closet was high, consistent with an in-progress fire breaching the room from another room (R. 433), and burned down toward the floor (R. 430-31);

--the absence of evidence to be expected if this had been a rekindle from inside the closet, including the amount of damage to the closet-side of the 2 x 4's, and the fact that the closet and stairs were as structurally sound as they had been before the fire (R. 430, 436-37);

--the absence of damage to some items in the closet which should have been damaged if the fire originated there, including cardboard, a vacuum cleaner and its cord, and papers (R. 418-19, 432-35);

--the fact that if the fire had started in the closet, he would expect to see a different pattern of burn than existed in the hall and around the family room door (R. 433-34) and a different level of charring (R. 521).

On February 14, 1995, Jerry Thompson arrived at the scene to investigate the cause and origin of the fire on behalf of United States Fidelity & Guaranty Insurance Company (R. 829-30, 832). The passage of time since the fire and the fact that much of the debris and furniture had been removed, windows had been boarded up, and the fire department had completed their work on the site added various considerations to Thompson's job but did not make it impossible (R. 849-50, 873-74). There was still ample evidence remaining, and he was able to view and evaluate the scene over several days and determine the area of origin of the fire (R. 833, 837, 849-50, 873-74). He did not speak to Meldrum, to the fire department personnel, or to the other experts until after he had completed his review of the scene, thereby ensuring that he reached his own independent determination (R. 833-34, 850, 861, 874-75, 877-78). In Thompson's expert opinion, the physical evidence established that the "fire started near the front [of the family] room on the floor with possibly materials that was [sic] available at the time." (R. 834-35, 837, 857). He determined that the fire in the closet was a light one, noting that there was very little burn evident in the closet except at the top where it would be expected (R. 836A, 867-69).

On February 18, 1995, Donald Peak arrived at the scene to investigate the origin and cause of the fire for CNA Insurance Company (R. 646-47, 649).[8] Peak also avoided speaking to fire department personnel or Meldrum until after he completed an independent evaluation of the scene (R. 647-48). As his investigation developed and no accidental causes presented themselves, his suspicions grew (R. 650). He concluded his investigation by determining that the fire's area of origin was low in the southwest quadrant of the family room from "about center to the room" to the door, burned into the hallway, entered the closet by burning into the closed door from the top (R. 651-54, 669, 672, 680, 699, 701-02, 748-49, 751). He determined that the fire also breached the common wall near the top, moving from the family room into the closet (R. 752-53). Numerous factors entered into this determination, including:

> --fire burn patterns showing that fire entered into the closet from outside (R. 663);
>
> --remaining sheetrock on the common wall that was unburned on the closet side (R. 663);
>
> --clean, unburned wood in the lower part of the storage room (R. 652, 671), and no general low-level burning in the room (R. 652);
>
> --the heaviest damage was in the family room and in the hallway outside the family room, with moderate to heavy damage up the stairwell and moderate damage under the stairwell (R. 650-51);

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[8]Despite defendant's claim that Peak examined the scene "immediately following the fire," (Aplt.'s Br. at 11), Peak did not arrive until three days following the fire (R. 333-34, 647).

--damage to the ceiling of the family room was heaviest by the door of the family room (R. 668-69);

--the ceiling of the closet showed more damage than lower down (R. 671);

--there was heavy damage on the exterior of the closet from the family room and from the hallway (R. 652, 663);

--the absence of heavier damage that would be expected had the fire started in the closet (R. 652, 663-64, 672, 680).

Aside from putting the origin of the fire in the same general area, all three experts found no concrete evidence of an accelerant (R. 423-24, 655, 835-36, 858), all believed the wiring was not involved as a cause (R. 585, 672-73, 837, 867, 875-76), and all three ruled out accidental causes (R. 414, 416-17, 655, 684-88, 836A-37, 863-65).[9]

Additional facts are developed where appropriate in the following arguments.[10]

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[9]Peak sent samples from the scene to a lab for testing, but no evidence of accelerants was found (R. 655, 713). However, Peak himself used a mechanical device at the scene which indicated that there were hydrocarbons--and therefore evidence of an accelerant--in the area (R. 712).

[10]The expert testimony in this case is the focus of the direct appeal. However, in addition to the expert testimony concerning cause and origin, the jury heard testimony about the severe financial trouble facing the Bastas (R. 461-63, 604-05, 610-11, 628-29, 689, 724-26, 839-40), the numerous eviction attempts by the property owners (R. 618, 622, 624, 627), the fact that defendant handled the family's finances (R. 757-58, 815), the fact that the entire family appeared ignorant of the financial situation except defendant (R. 756-58, 760, 793-94, 815-16, 819), the confusing stories and comments made by defendant both before and after the fire (R. 457-60, 462-63, 623, 769, 814, 817), and the fact that defendant obtained a homeowner's insurance policy on the house five or six days before the fire and ten days after receiving the last eviction notice, despite her knowledge that, as renters, her family was not entitled to such a policy (R. 632-35, 769-70, 815, 882).

SUMMARY OF THE ARGUMENTS

Point I: Although the prosecutor did not "specifically respond" to defendant's request for details of plea bargains reached between the State and any witnesses it intended to use at trial, defendant is not entitled to reversal based on the nondisclosure of details of a plea bargain reached between the State and one of its expert witnesses, David Meldrum, in an unrelated theft case. Although defendant discovered the charges prior to the preliminary hearing and intended to make use of the plea bargain to impeach Meldrum at trial, he failed to take any steps to mitigate any possible prejudice from the nondisclosure until after the jury rendered its verdict. Moreover, the information--preserved post-trial in the form of a transcript of the plea hearing in the theft case--is neither constitutionally material nor reasonably likely to have affected the jury's judgment.

Point II: Reversal is not warranted for destruction of the wiring located in the common wall between the closet and the family room because the wiring was neither constitutionally material nor clearly exculpatory. Dave Meldrum--the only expert to personally inspect the wiring--determined from his inspection of the wiring and of the rest of the fire scene that the wiring did not cause the fire. Both of the State's remaining experts were confident in reaching the same determination despite their inability to inspect the wiring. Defendant's expert voiced the sole contrary view based solely on photographs, which the jury rejected in the face of all the evidence surrounding the

missing wiring and defendant's closing argument stressing the importance of the wiring to a determination of the fire's cause.

ARGUMENTS

POINT I

DEFENDANT'S FAILURE TO TIMELY TAKE REASONABLE STEPS TO MITIGATE THE CLAIMED PREJUDICE OR TO INVESTIGATE THE PLEA BARGAIN UPON HER PRE-TRIAL DISCOVERY OF IT PREVENTS CONSIDERATION OF THIS CLAIM; ALTERNATIVELY, SHE ESTABLISHES NO PREJUDICE, AND SHE FAILS TO PROVE THAT MELDRUM GAVE FALSE TESTIMONY, CONDEMNING HER RELATED CLAIM OF PROSECUTORIAL MISCONDUCT

Defendant contends that the State violated her constitutional rights to a fair trial and to due process of law by failing to disclose to her prior to trial the details of its plea agreement with Dave Meldrum in an unrelated theft case against him. Aplt.'s Br. at 25-26. She claims that Meldrum's testimony and his credibility were material to the case, and that the State's violation of its disclosure duty materially impacted on the proceedings, warranting a reversal. Id. She also contends that when asked about the plea agreement at trial, Meldrum offered false testimony "that he had no deal with the State and that his testimony at trial against Mrs. Basta had nothing to do with the deal he received" in his theft case. Id. at 26. Finally, she challenges the prosecutor's closing remarks in rebuttal which argued Meldrum's credibility as a witness. Id. at 30.

The relevant chronology of events is as follows:

Feb. 11, 1995	Meldrum investigates Basta fire immediately after it is extinguished (R. 407-08);
April 6, 1995	The instant charges are filed against defendant; Meldrum knows at this point that he will be a witness for the State (R. 464-65);
April 11, 1995	Defendant files a written discovery request seeking, among other things, the criminal record and existing plea bargain agreements for each of the State's witnesses (R. 14-16);
April 26, 1995	Meldrum steals a trailer (R. 466);
May 12, 1995	Meldrum is charged with third degree theft of the trailer (R. 178, 469);
May 1995	Meldrum is dismissed as Sandy City Fire Marshal because of the theft case (R. 465-66, 591-92);
May 1995	Defendant discovers a newspaper story that Meldrum was discharged as fire marshal because of the criminal case (R. 1077-78, 1085);
June 1, 1995	Defendant files a supplemental discovery request pertaining solely to Meldrum, but makes no mention of the theft charge (R. 23-24);
June 20, 1995	Meldrum testifies at the preliminary hearing in this case (R. 19, 470, 1081); defendant cross examines him at length about the theft case (R. 1077-78, 1081, 1085);
July 20, 1995	Meldrum appears for a change of plea hearing in the theft case and enters a plea of "no

	contest" to be held in abeyance for one year (R. 178, 470-71, 477, 579);
Nov. 13, 1995	Defendant obtains a docket sheet of the theft case which reflects information about the plea (R. 178-79, 1074);
Nov. 14, 1995	After trial begins, the trial court grants defendant's verbal motion to use the plea bargain from the theft case to establish Meldrum's bias in the Basta case (R. 389-400, 1087);
Nov. 15, 1995	Defendant cross-examines Meldrum in depth concerning the plea bargain reached in the theft case (R. 466-77, 1087);
Dec. 13, 1995	Defendant files her second of two post-judgment motions to arrest judgment. This involves the State's alleged failure to disclose the details of the plea bargain in the theft case, and includes a partial transcript of the plea hearing (A copy of which is attached as addendum D)(R. 169-82). This is defendant's first notification to the trial court of the alleged discovery violation.

A. Reversal Is Not Warranted Because Defendant Failed To Pursue All Reasonable Means To Mitigate The Claimed Prejudice, And Failed To Establish The Constitutional Materiality Of The Undisclosed Information

Defendant claims that the prosecutor should have disclosed the details of the plea agreement pursuant to its written request because the information was relevant to Meldrum's credibility at trial and, therefore, was material to defendant's guilt or

innocence. Aplt.'s Br. at 25-26.[11] She claims that the prosecutor's failure to disclose the information violated his responsibilities under Utah Rule of Criminal Procedure 16(a)(4) and the federal constitution.[12]

1. Utah Rule of Criminal Procedure 16

Utah Rule of Criminal Procedure 16 imposes upon the prosecutor various discovery responsibilities (a copy of the rule is attached in addendum E).[13] In this case, the prosecutor candidly admitted that he "failed to specifically respond" to defendant's request for information as to plea bargain agreements between the State and any of its witnesses (R. 201).[14]

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[11]Although defendant's brief notes that the prosecutor failed to disclose the theft charges, the existence of the plea, and the details of the plea agreement, Aplt.'s Br. at 19-20, defendant's argument includes only the last point. Id. at 25-26.

[12]Defendant also mentions the state constitution, but does not propose an analysis different from the federal analysis. See State v. Horton, 848 P.2d 708, 710-11 (Utah App.) ("mere allusion to state constitutional claims, unsupported by meaningful analysis, does not permit appellate review"), cert. denied, 857 P.2d 948 (Utah 1993).

[13]Defendant summarily claims that his request for information regarding offers of leniency made by the State to its witnesses is covered by subsection (a)(4), thereby automatically requiring a response from the State. Aplt.'s Br. at 24-25. Subsection 4 involves information which tends to negate or mitigate defendant's guilt. Utah R. Crim. P. 16(a)(4). In contrast, defendant's request involves information pertaining solely to witness credibility. Such information is properly reviewed under subsection 5. State v. Mickelson, 848 P.2d 677, 688-89 (Utah App. 1992) (involving criminal records of State witnesses); see also State v. Knight, 734 P.2d 913, 916 (Utah 1987).

[14]The record does not reflect how the prosecutor chose to respond to defendant's discovery request. To the extent the prosecutor should have disclosed the plea information prior to trial, his failure to do so was erroneous. However, when defense

However, the mere existence of a violation of rule 16(a) does not warrant reversal. Where a defendant fails to make use of alternative reasonable means to mitigate possible prejudice from a discovery violation or to investigate the facts of the case, his appellate claim of reversible error based on the discovery violation is extinguished. State v. Kallin, 877 P.2d 138, 143 (Utah 1994) (one factor to be reviewed in addressing a claimed discovery violation is "the extent to which appropriate defense investigation would have discovered the omitted or misstated evidence"); State v. Griffiths, 752 P.2d 879, 883 (Utah 1988); State v. Mickelson, 848 P.2d 677, 691 (Utah App. 1992); State v. Christofferson, 793 P.2d 944, 948 (Utah App. 1990); see also State v. Knight, 734 P.2d 913, 916 n.1 (Utah 1987) (failure to properly request a court order under subsection (a)(5) "may be fatal to a claim based on the nondisclosure of evidence").

In this case, defendant had ample opportunity to mitigate possible prejudice from the nondisclosure, but failed to do so. No theft charges existed until more than one month after defendant made her original written discovery request in April. Defense counsel freely admitted that he learned of the criminal charges prior to the June preliminary hearing and cross-examined Meldrum about them at that hearing (R. 1077-78). Defense

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counsel inquired into the criminal charges at the preliminary hearing, then called the prosecutor before trial to say that he would use the plea agreement to establish bias at trial, and did not seek any further information about the plea agreement, it became apparent that counsel already knew the information he wanted. Thus, the prosecutor would have been justified in believing that there was nothing left to be disclosed.

counsel also filed a supplemental discovery request on June 1, asking for further information about Meldrum but making no mention of the theft charge (R. 23-24). Before the November trial, defense counsel obtained a copy of the docket from the theft case (R. 178-79, 1074), as well as copies of police reports and forged receipts used by Meldrum for the theft (R. 390, 400). Counsel also contacted the prosecutor prior to trial to inform him that defendant intended to use the plea bargain to impeach Meldrum's credibility at trial (R. 1085). Defense counsel thereafter conducted a lengthy and thorough cross-examination at trial into the facts of the theft case and the plea bargain entered into by Meldrum (R. 466-77). The record reflects no effort by defendant either before or during trial to bring the discovery violation to the trial court's attention or to obtain from the State any clarification of the plea bargain once its existence was known. Instead, defendant chose to wait until after the jury rendered a verdict before she subpoenaed the tape of the plea hearing in the theft case and told the trial court about the discovery violation (R. 169-82, 1074-75). Defendant's failure to take reasonable steps to mitigate possible prejudice once she knew of the discovery violation or to undertake a reasonable

investigation prior to entry of a verdict defeats her claim of reversible error on appeal.[15] Kallin, 877 P.2d at 143; Mickelson, 848 P.2d at 691; Christofferson, 793 P.2d at 948.

Further, reversal is not warranted unless the undisclosed information "may have had a significant impact upon the trial such that [its] nondisclosure constitutes prejudicial error." Mickelson, 848 P.2d at 691; see also Utah R. Crim. P. 30 ("[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."). Because defendant establishes no such prejudice, see harmless error argument in subsection 2, infra, his claim of reversible error for a violation of rule 16 is without merit.

2. The Federal Constitution

Defendant also claims that the prosecutor's nondisclosure violated her constitutional due process rights. Different circumstances require application of different standards to such a claim. Defendant's arguments implicate two of those standards.

First, defendant claims that the undisclosed evidence shows that the State's case involved perjured testimony (i.e., that Meldrum "testified that he had no deal with the

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[15]Defendant's decision not to timely pursue the plea information despite her intent to rely on the information for impeachment of what she terms a "key" State's witness at trial verges on invited error. See State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987) ("'invited error' is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such result"); State v. Smith, 776 P.2d 929, 932 (Utah App. 1989) ("defendant cannot lead the court into error by failing to object and then later, when he is displeased with the verdict, profit by his actions").

State and that his testimony at trial . . . had nothing to do with" the deal he reached with the State in the theft case), and that the prosecutor knew it. Aplt.'s Br. at 26-34. In this situation, the conviction will be set aside only if there is "'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Codianna v. Morris, 660 P.2d 1101, 1106 (Utah 1983) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976)).

Second, defendant claims that the State had a duty to respond to the written pretrial request for plea bargain information. Aplt.'s Br. at 22-26. In this situation, the nondisclosed evidence must be both favorable to the defendant and material to guilt or punishment before reversal is warranted. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196 (1963); State v. Shaffer, 725 P.2d 1301, 1304-05 (Utah 1986). However, a defendant must establish more than mere evidentiary materiality: he must establish "constitutional materiality." Agurs, 427 U.S. at 112-13, 96 S. Ct. at 2401-02; State v. Nebeker, 657 P.2d 1359, 1363 (Utah 1983); State v. Humphrey, 793 P.2d 918, 926 (Utah App. 1990). To establish constitutional materiality, defendant must show "'that the suppressed or destroyed evidence is vital to the issues of whether the defendant is guilty of the charge and whether there is a fundamental unfairness that requires the Court to set aside the defendant's conviction.'" Humphrey, 793 P.2d at 926 (quoting State v. Lovato, 702 P.2d 101, 106 (Utah 1985)). In other words, there can be no violation of a disclosure duty unless the omission is of sufficient significance to result in a denial of defendant's

right to a fair trial. Agurs, 427 U.S. at 108, 96 S. Ct. at 2399-400. The mere possibility that the undisclosed evidence might have affected the trial's outcome does not establish constitutional materiality. Shaffer, 725 P.2d at 1305. The nondisclosed material must be reviewed in the context of the entire record, and reversal is not warranted if there is no reasonable doubt about defendant's guilt whether or not the material is considered. Agurs, 427 U.S. at 112-13, 96 S. Ct. at 2402 (finding the victim's prior criminal history not to be material).

Defendant's claim fails under either of these standards because: 1) the plea transcript fully supports Meldrum's testimony; and 2) the undisclosed information, as established by the transcript, is not constitutionally material because, even assuming it affected Meldrum's credibility, there was sufficient evidence concerning the cause and origin of the fire without consideration of Meldrum's testimony to support the verdict. Codianna, 660 P.2d at 1108 (where the withheld evidence was tangential or cumulative and the record contained overwhelming evidence of defendant's guilt, reversal was not appropriate).

a. Meldrum's testimony comports with the plea agreement

The undisclosed information, as established in the plea transcript, is fully consistent with Meldrum's testimony on cross-examination and adds nothing to defendant's attempt to impeach Meldrum. Amid questions detailing the facts behind the theft, the charge filed and the statutory sentence it carried, the charges that were possible

but were not filed, and the definition and details of the plea in abeyance, defense counsel cross-examined Meldrum, in relevant part, as follows:

[Defense Counsel:] When you testified against [defendant] at the preliminary hearing, you hadn't had this deal yet; isn't that right?

A. That's right.

Q. They hadn't extended this offer to you?

A. No.

Q. You knew if you testified against her [at the preliminary hearing] in a way that would help the State make its case, that you might receive some favorable treatment, such as this deal from the District Attorney's office; isn't that right?

A. Counsel, that's ludicrous.

Q. It's ludicrous?

A. It's offensive.

. . . .

Q. You're to cooperate with the State as part of your plea to make sure that the charges are dismissed?

A. Absolutely not.

Q. It's not true?

A. Absolutely not true.

Q. You see no connection between the deal that you were offered and your testimony in this case, Mr. Meldrum?

A. Your question was whether or not part of the deal was that I was to cooperate with the State.

Q Do you see any connection[,] Mr. Meldrum –

A. I do not.

Q. – between your testimony in this case and the deal that you received?

A. None whatsoever.

Q. Do you see any connection, Mr. Meldrum, in respect to your testimony in this case and the charges against you being dismissed outright?

A. Absolutely not.

(R. 473, 477) (the exchange is fully set forth in addendum F). This exchange establishes that: 1) Meldrum did not testify favorably for the State at the preliminary hearing out of any subjective belief it might result in a favorable plea bargain in the theft case;[16] 2) Meldrum was not required by the terms of the plea bargain to cooperate with the State to ensure that the theft charge was ultimately dismissed; and 3) Meldrum did not himself perceive any connection between his plea bargain and his trial testimony.

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[16]A transcript of the preliminary hearing is not included in the record.

As to the first point, defendant's implication at trial that Meldrum lied at the preliminary hearing in order to obtain a beneficial plea bargain is without support. Neither defendant nor the plea transcript establishes that a plea bargain was being considered at the time of the preliminary hearing, let alone that Meldrum knew of any such possibility. In fact, the prosecutor below noted that plea discussions began only after the preliminary hearing in this case (R. 200). Instead, the record shows that Meldrum never asked the prosecution about favors or favorable treatment (R. 1080-81). The terms of the plea bargain later offered to Meldrum give no insight as to the motivation behind his preliminary hearing testimony, which testimony was fully consistent with the cause and origin conclusions reached by Meldrum the week after the fire--nine weeks before he took the trailer (R. 576-78, 1079-80, 1082).

Regarding the second point, neither defendant nor the plea transcript establishes that Meldrum was required to testify favorably for the State in this case in order to have his theft charge ultimately dismissed. In the transcript, the prosecutor in the theft case noted that Meldrum was involved as a witness in several pending arson cases and that the State intended to prosecute those cases with Meldrum's "cooperation" (R. 180). Addendum D. Defendant interprets this as meaning that Meldrum's cooperation in the other cases was part of the plea bargain in the theft case. However, the prosecutor was merely giving necessary factual background before explaining that the "no contest" plea resulted from the State's concern about attempts to impeach Meldrum in the felony cases

with the theft plea (R. 180-81). Addendum D. In context, the exchange establishes that the State acted out of its unilateral concern for potential impeachment, not a concern that Meldrum's favorable testimony needed to be insured.[17] The consistency of Meldrum's trial testimony with his preliminary hearing testimony and with his earlier cause and origin determinations after the fire further suggests that neither Meldrum's appearance nor his testimony in the various arson cases was in question, and that the specter of impeachment was the State's sole concern in its formatting of the theft plea (R. 577-78, 1082).[18] This comports with Meldrum's responses to defense counsel's cross-examination.

Moreover, the State's reasons for reducing the charge--that the plea was handled in the same manner as any case, without any agreement or consideration of Meldrum's performance in the pending felony cases--are amply supported and were expressly explained to Meldrum through his counsel (R. 201, 472, 1080-81). Meldrum had no prior criminal history, the trailer was returned to its owner without damage within 24 hours of

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[17]Defendant's insinuations about the plea being conditioned on the prosecutor's agreement not to charge other possible crimes is purely speculation on defendant's part and has no record support.

[18]The State's concern was valid, as evidenced by defendant's argument below that the plea information was admissible for impeachment under Utah Rule of Evidence 609 (R. 391-94). The State's strategy was valid as well, inasmuch as the trial court denied admission of the evidence under rule 609 (R. 399-400). However, the trial court ruled that it was admissible to the extent it related to witness bias under rule 608 (id.).

being taken, and, because of the criminal charge, defendant lost his job of 17 years (R. 201, 578-79, 1080-81).

As to the third point, defendant did not ask if there was a connection between the trial testimony and the plea bargain: he asked if Meldrum *subjectively* saw any such connection. The plea colloquy does not establish Meldrum's subjective view of the plea bargain. As Meldrum did not seek any special treatment from the State, and was cognizant of the State's reasons (noted above) for entering the plea, he may well have viewed the plea bargain as being independent of his testimony in this or any other case. Neither does the plea colloquy establish a connection between the plea bargain and Meldrum's testimony from an *objective* point of view: it shows only the State's preoccupation with Meldrum's possible impeachment.

The plea transcript fully supports Meldrum's responses establishing that he was not testifying because of an agreement with the State, leaving no false testimony to affect the jury's judgment. Codianna, 660 P.2d at 106. Further, nothing in the plea transcript rises to the level of constitutional materiality in the context of this record. Pre-trial disclosure of the information in the transcript would have had no impact on Meldrum's responses to defense counsel's questions and would not have established what defendant sought to suggest: that the content of Meldrum's testimony derived, not from fact, but from Meldrum's desire to take care of his criminal charge. Accordingly, reversal is not warranted, and defendant's claim fails.

b. Harmless error

Even assuming, arguendo, that pre-trial disclosure would have destroyed Meldrum's credibility, there was sufficient other evidence relating to the cause and origin of the fire to support the convictions.[19] That evidence included the testimony of two more experts for the State and an expert for defendant. None of the remaining experts were able to personally examine the missing wiring (see Point 2, infra). However, unlike defendant's expert, who relied solely on photographs in generating his opinion, both State's experts conducted on-scene investigations. They went out of their way to ensure their investigations were independent, and they reached the same conclusions as Meldrum regarding the cause and origin of the blaze, providing detailed explanations of the bases for their conclusions.[20] As the jury necessarily rejected the cause and origin testimony of defendant's expert in reaching the verdict, it is not reasonably likely that the jury would have credited his testimony had Meldrum been fully impeached.

Add to this the testimony of David Durrant, who was the lead firefighter on the team that battled the fire in the basement. His observations and conclusions, made during and after the battle with this fire and based on years of firefighting experience, fully

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[19]Meldrum's testimony related primarily to cause and origin. Defendant has not challenged the testimony of the other witnesses, which established the other requisite elements for the charged crimes.

[20]Exhibit 19, on which the experts marked their "area of origin" is inexplicably absent from the record on appeal. However, the prosecutor represented below that all the State's experts indicated the same area of origin (R. 1027-28).

support the cause and origin determinations made by Peak and Thompson (see pp. 5-6, supra). Consequently, even if defendant's interpretation of the plea agreement were correct, and defendant had received the information in time to fully impeach Meldrum at trial, there was sufficient evidence remaining to support the jury's cause and origin determination beyond a reasonable doubt. Cf. Codianna, 660 P.2d at 1108 (there is no due process violation by withholding evidence when the evidence was tangential or cumulative and did not create a reasonable doubt of defendant's guilt in the context of a record which has more than sufficient evidence of guilt).

B. Because Meldrum Gave No False Testimony About The Theft Plea, The Prosecutor's Closing Argument Asserting Meldrum's Credibility Did Not Constitute Prosecutorial Misconduct

Defendant also contends that the prosecutor engaged in misconduct at least twice. First, he points to the prosecutor's closing remarks involving Meldrum's allegedly false testimony:

> Next, the Defense said, well, the reason you can't believe Meldrum is he's got an interest in the outcome of the case. He does? Did he get $2,000 to come in and testify like [defendant's expert]? I mean, there's a man who's no longer in the fire department. He could have just said, hey, forget it, forget it, I'm no longer there, I don't really care, but the fact that Meldrum comes in here and testifies and tells you the same thing that he concluded back in February says something about his integrity. It says something about the man. That was his call to make. That was his conclusion." (R. 1034) (a copy is attached in addendum G).

Aplt.'s Br. at 30-31. Second, he claims that the prosecutor "kept from the defense accurate information and truth [sic] about Meldrum's criminal history and plea bargain."[21] Id. at 30.

An appellate court will reverse on the basis of prosecutorial misconduct only if "the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant." State v. Hay, 859 P.2d 1, 7 (Utah 1993) (additional quotations omitted).

Reversal is not warranted in this case. First, the closing remarks are not erroneous inasmuch as witness credibility was an appropriate subject for closing argument. State v. Cummins, 839 P.2d 848, 853-54 (Utah App. 1992) (a prosecutor cannot vouch for a witness' credibility but can comment on witness credibility to the extent the comment is a reasonable inference from the evidence), cert. denied, 853 P.2d 897 (Utah 1993). Meldrum testified that the plea bargain in the theft case was not conditioned on his testimony in this case, providing evidence from which the prosecutor was able to make the challenged argument that he got no benefit from testifying in this case.

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[21]Defendant also alleges misconduct arising from the prosecutor's use of Meldrum's "false/perjured testimony". Aplt.'s Br. at 30. However, Meldrum did not "blatantly deny[]the truth of the plea bargain" as defendant claims. Meldrum did not deny the existence of the plea agreement, only that it was conditioned on his giving favorable testimony for the State in this case. As his testimony comported with the plea bargain (see Point IA(2), supra), there was no false testimony and, hence, no misconduct.

Second, even if the prosecutor had timely informed defendant of the details of the plea bargain as set forth in the transcript, and defendant was able to use that information to persuade the jury that Meldrum was an incredible witness, the evidence was such that there can be no reasonable likelihood that the jury would have entered a more favorable judgment for defendant. See harmless error argument in Point IA(2), supra. Accordingly, there is no merit to defendant's claims of prosecutorial misconduct.

POINT II

WHERE THE WIRING WAS NEITHER CONSTITUTIONALLY MATERIAL NOR CLEARLY EXCULPATORY, THE FACT THAT IT WAS PRESERVED ONLY IN PHOTOGRAPH FORM DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS

Defendant contends that her due process and fair trial rights were violated by the State's failure to preserve the wiring and breaker panel box removed from the wall of the closet by Meldrum. Aplt.'s Br. at 34-44. However, there was no duty to preserve the evidence because it was neither constitutionally material nor clearly exculpatory.[22]

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[22]Elsewhere in her brief, defendant purports to challenge the State's failure to preserve the *scene* of the fire coupled with the prosecution's attack on defendant's expert for failing to examine the scene in person. Aplt.'s Br. at 17. However, no mention is made of this point in the body of defendant's written argument. Id. at 34-44. Hence, the issue is not properly before this Court and should not be reached on appeal. Utah R. App. P. 24(a)(9); State v. Montoya, 937 P.2d 145, 150 (Utah App. 1997) (absent an argument as specified by rule 24(a)(9), the appellate court will not reach an issue).

Even if the argument is reached, it fails absent any authority to impose on the State the burden of preserving the scene solely to prevent such an argument at a possible criminal trial. The law and professional ethics impose strict duties of good faith and

Where evidence material to the guilt or innocence of an accused in a criminal case is deliberately suppressed or destroyed, there is a denial of due process. State v. Humphrey, 793 P.2d 918, 926 (Utah App. 1990). However, as with the claimed constitutional discovery violation in Point IA(2), supra, defendant is not entitled to a reversal unless he establishes the "constitutional materiality" of the destroyed evidence. State v. Nebeker, 657 P.2d 1359, 1363 (Utah 1983); Humphrey, 793 P.2d at 926. This burden is not satisfied by showing a mere possibility that the evidence might have affected the trial's outcome. State v. Shaffer, 725 P.2d 1301, 1305 (Utah 1986).

The State's duty to preserve evidence is limited to evidence that would be expected to play a significant role in the defense: the evidence must possess both an exculpatory value apparent before the evidence was destroyed, and be of such a nature that defendant would be unable to obtain comparable evidence by other reasonably available means. California v. Trombetta, 467 U.S. 492, 488-89, 104 S. Ct. 2533, 2534 (1984); Salt Lake City v. Emerson, 861 P.2d 443, 448 (Utah App. 1993); see also Shaffer,

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disclosure on criminal investigators and state authorities, and the impracticalities associated with preservation of such a scene for an extended period of time dictate against the existence of such a duty. The scene was preserved in the most practical manner possible--photographs. The fact that defendant's expert had to rely on the photographs does not automatically render the witness incredible, but factors into the jury's weighing responsibilities. Moreover, defendant was free to point out to the jury that no scene remained for his expert to review--a fact he established in his post-trial motions (R. 218-38). Absent persuasive authority for imposing such a burden on the State, his position fails.

725 P.2d at 1306-07 (the prosecutor must preserve incriminating and exculpatory evidence material to the case; the evidence must be preserved if it is reasonably apparent that the evidence potentially constitutes material evidence).

Defendant claims that the constitutional materiality of the wiring and breaker box [hereinafter "wiring"] is established by a number of factors: the number of pictures Meldrum took before it was lost; the fact that it was a possible cause of the fire according to the State's own experts; the proximity of the wiring to the area of origin; the importance of the wiring's pliability and the inability of pictures to convey this fact; the fact that it was important enough to remove from the wall; the fact that Donald Peak noted in his report that it should be examined; and the determination by defense expert David Smith that char patterns showed it to be involved in causing the fire. Aplt.'s Br. at 40-41. However, defendant's argument is not credible under the facts of this case. The evidence was not vital to defendant's guilt or innocence of the charges, and there was nothing which suggested to the State at the time the wiring was available that it would have exculpatory value in these proceedings.[23]

Meldrum was the sole individual to examine the wiring, and he in fact preserved the wiring in the form of thirteen photographs (R. 530-31), all of which ensured careful

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[23]There is no dispute in the evidence that the wiring was actually in the fire: the question is whether it caused the fire. Even defendant's own expert, David Smith, could not determine from the mere existence of arcing and beading whether the wiring was a cause or a casualty of the fire (R. 915).

documentation of the location of and damage to the wiring. The photos demonstrate the care with which Meldrum reviewed the scene, not the importance of the evidence to the case. Moreover, if, as defendant claimed below, Meldrum was intent on destroying the evidence to fabricate an arson theory, common sense dictates that he would take few, if any, photographs of something he wanted no one to see.

All the experts agreed that, in fire investigations where electrical wiring is present, the wiring could be a possible cause of the fire until it can be eliminated (R. 414, 672-73, 684, 836-37, 914). After thorough investigation, Meldrum determined that the fire started on the floor of the family room, not on the common wall where the wiring was located (R. 412-13). He also found that the wire did not exhibit characteristics indicative of fire causation (R. 440-44, 585). Instead of being brittle, as it would be if it had caused the fire, the wiring was soft and pliable (R. 441). While pliability cannot be determined from the photographs (R. 569), it is but one of several factors to be considered in judging whether the wiring caused the fire or simply was consumed by the fire. As a result of his investigation, Meldrum eliminated the wiring as a cause of the blaze (R. 585).[24] As he saw no exculpatory value in the wiring, he found no need to preserve it (R. 443-44, 585).

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[24]Defendant misinterprets Meldrum's testimony as being that the wiring and the breaker panel showed the fire was non-accidental. Aplt. Br. at 11, 25. Meldrum was clear that his elimination of the wiring as a cause of the fire was based not only on his physical examination of the wiring but on other factors as well, not the least of which was his determination that the area of origin was away from the wall where the wiring was located.

Although they did not inspect the actual wiring, the State's two remaining experts made similar determinations over the days following the blaze. Jerry Thompson was not concerned that the wiring was unavailable, nor did he try to determine its whereabouts (R. 863, 866-67). The mere fact that it had been removed from the wall caused him no concern (R. 862-63, 867). In response to defense counsel's thorough questioning at trial, Thompson noted that his investigation of the scene made it obvious that he did not need to look at the actual wiring in order to eliminate it as a cause of the fire (R. 837, 867). He found that the entire wall on which the wiring had been located had nothing to do with the cause of the fire, and that the fire's origin was lower to the floor, away from the wall (R. 875-86). Consequently, any information to be gleaned from the wiring was unimportant to his determination of cause and origin.

Donald Peak similarly viewed the wiring as having no exculpatory value. While he would normally examine such wiring in the course of an investigation and noted in his report that he felt that the investigation would be more complete if the wiring could be inspected (R. 735; Defendant's Exhibit 53, p. 2),[25] his inability to view the wiring caused him no concern because he was otherwise able to determine that electricity played no part in igniting the fire (R. 672-73, 695-96, 707, 748). His elimination of an electrical cause to

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[25]The report said "Elect[rical] taken by [fire department] needs to be examined." (Def's Exhibit 53, p.2; R. 735). Peak explained at trial that the entry did not mean that he needed to examine it but that someone should (R. 733-35).

this fire was based on statements from various individuals, burn patterns at the scene, his own examination of other electrical mechanisms, the absence of damage he would expect to see had the wiring been at fault, and the fact that the area of origin did not include the wall where the wiring had been located (R. 672-73, 696, 704, 707, 736-37, 748).[26]

Even the jury rejected the suggestion that the wiring was a vital piece of evidence. The jury had before it the opinions of all four experts and rejected Smith's testimony suggesting that the wiring played an important part in the fire. The trial judge commented three times at sentencing that there was sufficient evidence from which the jury could convict defendant, suggesting that he, too, was unpersuaded by Smith's suggestion (R. 1100-01, 1103). This Court is being asked to rule that the wiring was vital to the defense based on no more evidence than was presented to and rejected by the trial judge and the jury. The argument is no more persuasive now than it was below.

Where three experts in three independent investigations found no exculpatory value in the evidence, and the sole determination that the wiring might be involved in causing this particular fire was not made by defendant's expert until weeks after the

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[26]Defendant cites to Peak's initial notes of his investigation to claim that Peak believed the origin of the fire was in the "exact location" of the wiring Meldrum removed from the common wall. Aplt.'s Br. at 12. This statement becomes meaningless in view of Meldrum's testimony that he took out all the wiring from inside the stairwell closet (R. 440). Further, Peak explained at trial that while the fire may have originated "on or near" the common wall, it did not start inside the wall and did not begin with the wiring (R. 703-07). Instead, he said it started low to the floor away from the wall (R. 748-49).

wiring had disappeared, whatever exculpatory value the wiring had, if any, could not be said to be readily apparent when the wiring was last seen shortly after the fire was extinguished. On this record, the wiring might have offered, at best, a mere possibility of evidence favorable to defendant. As such, the State was under no obligation to preserve it. Shaffer, 725 P.2d at 1306; Emerson, 861 P.2d at 448.

Defendant theorizes that if something might conceivably be a possible cause of fire, it is foreseeable that evidence of that possible cause would play a "significant part in the suspect's defense" and that it should, therefore, be preserved. Aplt.'s Br. at 39, 40 (quotation omitted). Carried to its logical conclusion in light of the uncontested testimony that fire investigators view all accidental sources of fire as a possible cause in any given fire until each source is eliminated, defendant's theory would require that the State preserve evidence of all possible causes of fire at every fire scene, including all wiring, furnaces, water heaters, appliances, fixtures, and similar items, regardless of the evidence the State may have suggesting they were uninvolved in causing any fire (R. 414). Such a burden is unwarranted and unprecedented. See, e.g., Shaffer, 725 P.2d at 1306 ("To require the prosecution to gather all 'relevant' exculpatory evidence before a suspect has been identified and before the State is notified of possible defenses, is to require the impossible.").

Defendant adds that it is fundamentally unfair for the State to destroy the wiring then be permitted to challenge at trial the defense expert's conclusions because of his

reliance on photographs in lieu of inspecting the actual wiring. Aplt.'s Br. at 42-43. Aside from being unpersuasive, this reasoning fails because the prosecutor did not challenge Mr. Smith's failure to examine the wiring. It was made clear to the jury that the wiring was unavailable to everyone who entered the case after Meldrum's on-site investigation. The prosecutor challenged Mr. Smith's ability to make the ultimate cause and origin determination based solely on pictures and written documents (R. 994-95) (attached in addendum G). Even if the wiring had been preserved, the prosecutor's criticism of Mr. Smith's methods would remain viable because the wiring represents only one of many possible accidental causes of this fire, and the remainder of Mr. Smith's review of the cause and origin of this fire would still be based on photographs. Accordingly, the absence of the wiring does not establish a fundamental unfairness worthy of a reversal.

Defendant has not established that the wiring was vital to the issue of her guilt or innocence, possessed an exculpatory value apparent at the time Meldrum inspected it, or represents any fundamental unfairness worthy of reversal. Consequently, the wiring is not constitutionally material, and defendant's claim of reversible error fails.

POINT III

THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY TO THIS CASE

Under the cumulative error doctrine, this Court "will reverse only if 'the cumulative effect of the several errors undermines our confidence . . . that a fair trial was

had.'" State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993). Because there are no multiple identifiable errors in this case, the cumulative error doctrine does not apply. Parsons v. Barnes, 871 P.2d 516, 516 (Utah) (citing Bundy v. DeLand, 763 P.2d 803, 806 (Utah 1988) (additional citations omitted), cert. denied, 513 U.S. 966 (1994); Rasmussen v. Sharapata, 895 P.2d 391, 392 n.1 (Utah App. 1995).

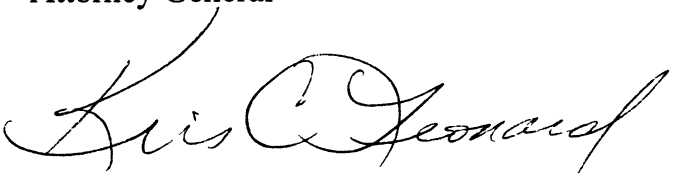
To the extent this Court disagrees and finds multiple errors, each of the errors constitutes harmless error, as argued in Points I and II, supra. Accordingly, this Court should determine that the cumulative effect of the harmless errors does not undermine confidence in the fairness of the trial. State v. Alonzo, 932 P.2d 606, 617 (Utah App.), cert. granted, 940 P.2d 1224 (Utah 1997).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions.

RESPECTFULLY SUBMITTED this 13th day of April, 1998.

JAN GRAHAM
Attorney General



KRIS C. LEONARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Richard G. Uday, attorney for appellant, 356 East 900 South, Salt Lake City, Utah 84111, this 13th day of April, 1998.

ADDENDA

Addendum A

76-6-103. Aggravated arson.

(1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:

(a) a habitable structure; or

(b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

(2) Aggravated arson is a felony of the first degree.

History: C. 1953, 76-6-103, enacted by L. 1973, ch. 196, § 76-6-103; 1986, ch. 59, § 2.

Cross-References. — Destruction of school property, § 76-8-715.

76-6-521. False or fraudulent insurance act — Punishment as for theft.

(1) A person commits a fraudulent insurance act if that person with intent to defraud:

(a) presents or causes to be presented any oral or written statement or representation knowing that the statement or representation contains false or fraudulent information concerning any fact material to an application for the issuance or renewal of an insurance policy, certificate, or contract;

(b) presents, or causes to be presented, any oral or written statement or representation as part of or in support of a claim for payment or other benefit pursuant to an insurance policy, certificate, or contract, or in connection with any civil claim asserted for recovery of damages for personal or bodily injuries or property damage, knowing that the statement or representation contains false or fraudulent information concerning any fact or thing material to the claim;

(c) knowingly accepts a benefit from proceeds derived from a fraudulent insurance act;

(d) intentionally, knowingly, or recklessly, devises a scheme or artifice to obtain fees for professional services, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions.

(2) (a) A violation of Subsection (1)(a) is a class B misdemeanor.

(b) A violation of Subsections (1)(b) through (1)(d), is punishable as in the manner prescribed by Section 76-10-1801 for communication fraud for property of like value.

(3) A corporation or association is guilty of the offense of insurance fraud under the same conditions as those set forth in Section 76-2-204.

(4) The determination of the degree of any offense under Subsections (1)(b) through (1)(d) shall be measured by the total value of all property, money, or other things obtained or sought to be obtained by the fraudulent insurance act or acts described in Subsections (1)(b) through (1)(d).

History: C. 1953, 76-6-521, enacted by L. 1973, ch. 196, § 76-6-521; 1994, ch. 243, § 13.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, rewrote this section to such an extent that a detailed analysis is impracticable.

Addendum B

960507-CA

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

THE STATE OF UTAH,

Plaintiff,

vs.

BETTY BASTA,

Defendant.

REPORTER'S TRANSCRIPT OF DEFENSE MOTIONS

Case No. 951901219 CR

REPORTER'S TRANSCRIPT OF DEFENSE MOTIONS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, December 15, 1995

For the Plaintiff: ERNEST W. JONES
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
363-7900

For the Defendant: MARK R. MOFFAT
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
532-5444

ANNA M. BENNETT, C.S.R.
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

ORIGINAL

to do that and they're the ones that want it both ways in this particular case, Judge.

The fact of the matter is that this wire was absolutely critical. It should have been preserved. Everything that Mr. Meldrum did with respect to the wiring, every notation we have from Mr. Peak about the importance of and possible location of the scene of the fire indicates that this wire was a critical, material piece of evidence. It was material in the constitutional sense because no matter which way you cut it, Judge, it was material to the issue of guilt or innocence, and the fact that we're not dealing with mere possibilities here, we're dealing with very, very real evidence, your Honor, that shows that the wire was a very probable source of ignition of this fire.

THE COURT: All right. Thank you, Mr. Moffat.

I'm of the view that the motion should be and therefore is denied for the reasons stated in the memorandum in opposition and the argument here of Counsel today. That issue was, in my judgment, my recollection of the evidence at trial, exhaustively gone into and the jury had the opportunity to weigh and consider and concluded, unfortunately for the Defense, that Ms. Basta indeed was the guilty party. I'm going to deny that motion therefore.

The next hearing in this matter will be Monday at 1:30, at which time I will entertain your second motion to

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

* * *

THE STATE OF UTAH,

Plaintiff,

vs.

BETTY BASTA,

Defendant.

REPORTER'S TRANSCRIPT OF DEFENSE MOTIONS AND SENTENCING PROCEEDINGS

Case No. 951901219 CR

REPORTER'S TRANSCRIPT OF DEFENSE MOTIONS AND SENTENCING PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Monday, December 18, 1995

For the Plaintiff:

ERNEST W. JONES
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
363-7900

For the Defendant:

MARK R. MOFFAT
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
532-5444

ANNA M. BENNETT, C.S.R.
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

960507-CA

have been examined by anybody, even Mr. Meldrum, and I relied on what Mr. Meldrum said in making my assessment.

Your Honor, his testimony was key and his credibility about those things was absolutely essential. Maybe the jury didn't buy off on what we were saying about the relationship between Mr. Meldrum's plea and the testimony and that very well may be, but maybe, your Honor, and it's quite likely that the reason they didn't buy off on it is because we didn't have the information that was in the plea arrangement to present to them to say look, he's lying.

We would submit it, Judge.

THE COURT: All right, Mr. Moffat. It is correct to state that the issue of Mr. Meldrum's prior difficulty with the law was brought to my attention on the morning of trial. In chambers Counsel and myself discussed at some length this question of the resolution of the Meldrum charge and I, over the objection of the State, determined that it would be appropriate to allow the jury as the final arbiter of the credibility of the witnesses to resolve the question of whether or not Mr. Meldrum was tainting his testimony by virtue of this transaction with the State.

My recollection of the trial at this point is that considerable cross-examination was engaged in of Mr. Meldrum. He did deny that the two circumstances had any connection, at least to the extent that he would consider changing his

testimony. In other words, subjecting himself to potential of perjury. That was done over the objection of the State.

The argument by counsel on both sides to the jury was that there had been a deal made and therefore, Meldrum's testimony should be discarded from the Defense perspective, and from the State's perspective that he was telling the truth, that even though he had been convicted of this, or at least had entered a plea of no contest to this other theft charge, that his testimony ought to be judged accordingly.

I must presume and I believe it is the case that the jury heard the circumstances and rendered their judgment based upon their evaluation of the credibility of the respective witnesses, knowing the circumstances behind Mr. Meldrum's prior criminal charge, and accordingly, for the reasons specified in the memorandum in opposition, Mr. Moffat, I'm compelled to deny your motion to arrest judgment and/or for new trial.

Having now ruled in this matter, I am of the view we must proceed with the sentencing as Ms. Basta is in custody and it's, I'm sure, a matter of considerable interest to her to get this matter behind her and therefore, if you agree, we'll proceed with the sentencing.

MR. MOFFAT: I certainly agree, your Honor.

THE COURT: All right. Ms. Basta, if you'll come forward with Counsel, please.

Addendum C

Diagram Sheet

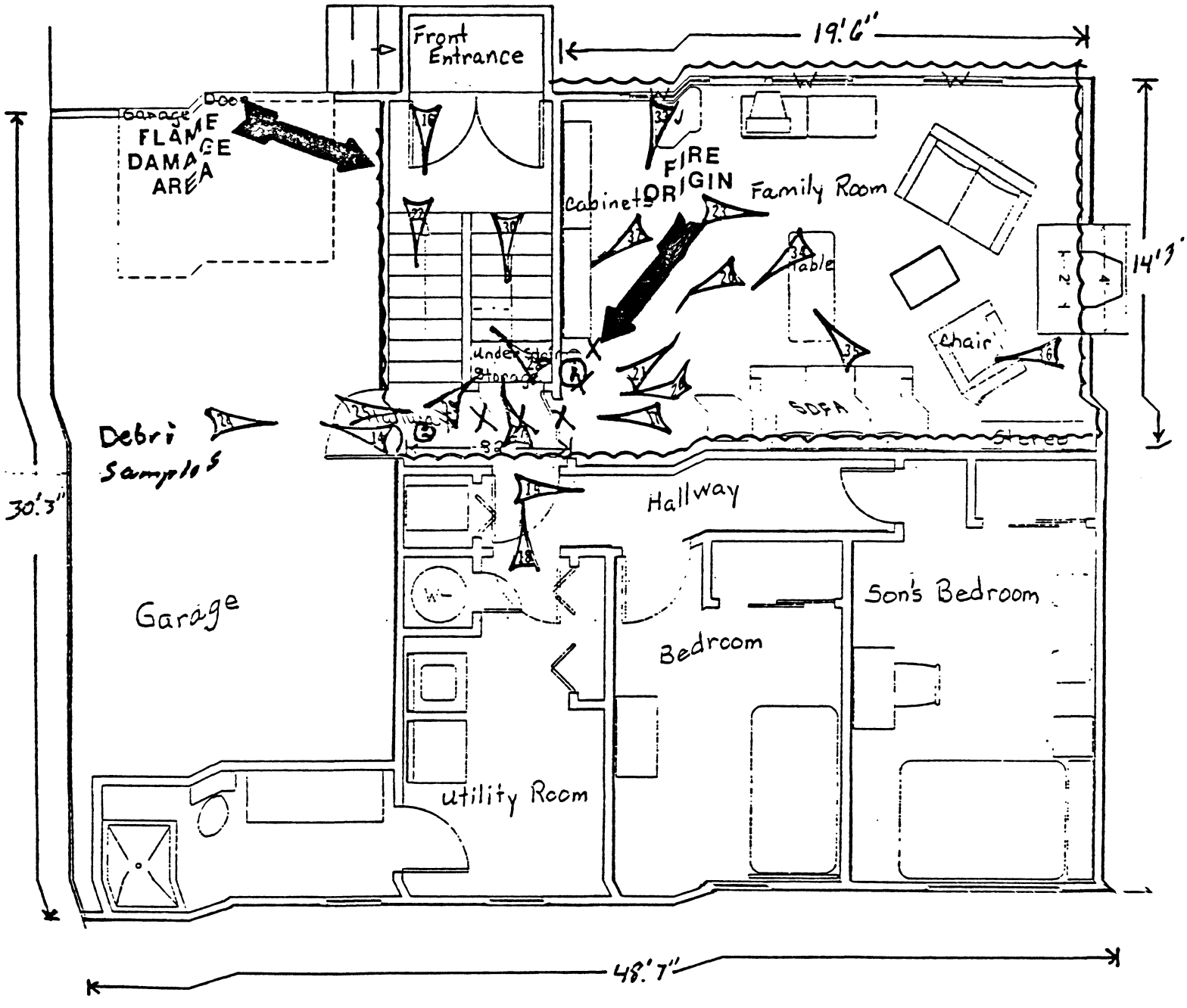
INS
Form 8010 (1/86)

Name (Property Owner)	Location	Identification No.
Robert & Betty Basta	916 E. Peach Blossom Dr. Sandy, Ut.	94603-05431

DEFENDANT'S EXHIBIT 101 95190129

PHOTOS 7-13 UP STAIRS

Basement Level

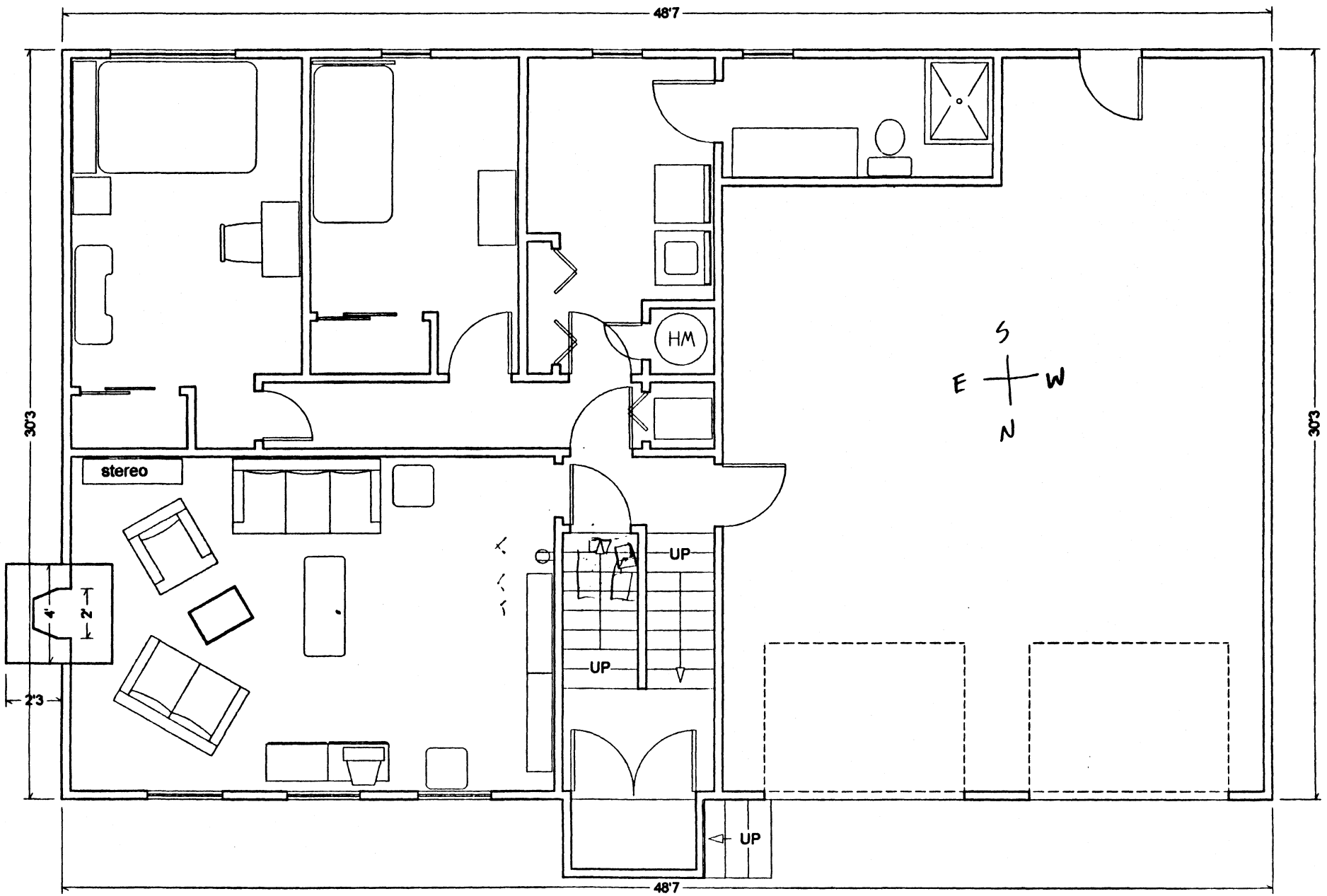


Prepared By	Date	Scale
Jerry Thompson	February 22, 1995	Not to Scale

This diagram is for illustrative purposes only and may not accurately represent the structure's, dimensions, entrances, partitions or room usage.

Basta-Lower Level

Thomson



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DEFENDANT'S EXHIBIT
HO
95190219
PENCAD-Bayonne, N. J.

Addendum D

STATE OF UTAH

v.

DAVID MELDRUM

Mr. Pusey: Your honor, Dave Meldrum.

Your honor, I believe we have a disposition for Mr. Meldrum as well. It is my understanding that the State would be willing to move to amend the single count information to a Class A Attempted Unlawful Control of a trailer..um to which Mr. Meldrum would enter a plea of No Contest, to be held in Abeyance for a period of one year. The proposed terms of the plea would be that he pay $150.00 in costs and that he be on good behavior with probation to the Court.

Judge: That would be the only terms of the Plea and Abeyance?

A. That's my understanding, your honor.

Judge: Mr. Shepherd is this your case?

Mr. Delasandro: It's mine, your honor.

Q. Why are we entering a No Contest on a theft case?

Mr. Delasandro: Well, there's actually a couple of reasons. Chief among them is that Mr. Meldrum, regardless of his prior position, is still involved in several felony investigations, cases that are pending and our plan at this point is to continue to prosecute those cases and with Mr. Meldrum's cooperation.

Judge: Are you telling me that a felony...that a misdemeanor plea would disable Mr. Meldrum from being a witness?

A. No, but I think ah...it wouldn't disable him but with a No Contest plea it would less likely be used for impeachment purposes

I guess the thought is, your honor, is that he's an expert witness and would be subject to impeachment and No Contest will have to be collaterally established in a similar fashion to what happens here today.

Judge: Well, if the plea is held in abeyance, wouldn't it have to be collaterally established anyway?

A. I think it's the plea that is admissible, and it's admissible as to the impeachment as opposed to a (inaudible).

Judge: Just an exception to heresy rule? It's a statement against interest, I guess, a declaration. Now, you're not suggesting however in asking me to take a No Contest plea in abeyance, Mr. Pusey, that in fact that the...that the incident did not occur which in fact your client did not in fact hook the trailer onto his truck and make a post-Miranda admission that he took it without permission?

A. No. We're not making an alford plea, your Honor.

Judge: O.K. It would be an accurate to state then...that my understanding is again both the Plea in Abeyance I suppose could be premised upon lack of prior criminal history but the plea in Abeyance, at least in part, as well as the No Contest plea is so that Mr. Meldrum can in fact be more likely be able to testify as an expert witness in any pending cases, is that true?

A. That's true.

Court: Is Mr. Meldrum still employed in that same capacity?

A. He is not, your honor. I don't know his employment status but he definitely has been terminated from this.

Q. How many years?

A. 17 years merit position. He's paid a due price for (inaudible) mistake he made, your Honor.

Q: What happens to that 17 out of 20? Can't you just cash that out?

A. Yea.

Q. Is this like a recreational trailer?

A. No, utility.

Judge: With the understanding then the plea will be held in abeyance and not entered, Mr. Meldrum, how do you then plead to...is it a Class A then? Is it attempted?

A. Attempted I believe.

Judge: Attempted Unlawful Control of a motor vehicle, or trailer, during the date and at a place set forth in the Information, will it be guilty or No Contest?

A. No Contest, your honor.

Q. A No Contest plea is received but not entered. I'm going to direct the clerk of the Court to hold that No Contest plea in Abeyance for one year period of time. The conditions will be #1, your good behavior; and #2, the payment of $150.00 court cost assessment. If we give you 30 days from today, Mr. Meldrum, is that enough time to pay the court cost?

Meldrum: I'll just do it today.

Judge: If you'll step to the counter then downstairs and write out that check right away to take care of it, that will clear the financial part of it. Thank you.

Atty: Now, a year from now we'll be making appropriate motion to the Court to submit a copy to Mr. Delasandro.

Addendum E

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:

(1) appear in a lineup;

(2) speak for identification;

(3) submit to fingerprinting or the making of other bodily impressions;

(4) pose for photographs not involving reenactment of the crime;

(5) try on articles of clothing or other items of disguise;

(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;

(7) provide specimens of handwriting;

(8) submit to reasonable physical or medical inspection of his body; and

(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

Addendum F

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oOo-

STATE OF UTAH,	)	
	)	
Plaintiff,	)	Case No. 951901219
	)	
vs.	)	TRIAL TESTIMONY
	)	
BETTY BASTA,	)	VOLUME II
	)	
Defendant.	)	

-oOo-

Date: November 15, 1995

Time: 9:00 a.m.

Held at: THIRD DISTRICT COURT
451 South 200 East, Room 503
Salt Lake City, Utah 84111

Held before: Judge J. Dennis Frederick

-oOo-

APPEARANCES

For the Plaintiff: ERNEST W. JONES
Attorney at Law
DEPUTY DISTRICT ATTORNEY
231 East 400 South
Salt Lake City, Utah 84111

For the Defendant: MARK R. MOFFAT
Attorney at Law
LEGAL DEFENDERS
424 East 500 South, #300
Salt Lake City, Utah 84111

960507-CA

ORIGINAL

CROSS-EXAMINATION

BY MR. MOFFAT:

Q. Mr. Meldrum, there's a document in front of you which you have been looking at. Can you tell me what it is?

A. This is the UFIRS report.

Q. Mr. Meldrum, the fire that destroyed the Basta home took place on February the 11th of 1995?

A. Yes.

Q. And at that time, you were the Sandy City Fire Marshal?

A. Yes.

Q. And you had been the fire marshal for how long, as of that time?

A. Five or six years.

Q. The charges against Betty were filed, say, late March, early April of 1995. Does that sound about right to you?

A. They were filed the 6th of April.

Q. So early April of 1995?

A. Yes.

Q. You knew at the time that the charges were filed against Ms. Basta that you were going to be a material witness for the State in their prosecution of her?

A. Yes.

Q. So you knew that on April the 6th?

A. Yes.

Q. You knew that the State of Utah was going to rely on you in making their case, or attempting to make their case against Ms. Basta?

A. I knew that they would partly rely on me.

Q. You were the person that did the initial fire scene inspection?

A. That's right.

Q. You're the one that took the first photos at the scene?

A. That's right.

Q. You inspected the wire that you had taken the pictures of?

A. Yes.

Q. All right. You were an important witness to them?

A. I was a witness, yes.

Q. An important one; isn't that right?

A. I was a witness, yes. I don't how important.

Q. You don't think you were an important witness?

A. I don't know.

Q. You don't know?

THE COURT: Counsel, whether he was important or not I think is a judgment to be made by prosecution, not by this witness.

Q. (By Mr. Moffat) Mr. Meldrum, at the present time

you're no longer the Sandy City Fire Marshal; are you?

A. That's right.

Q. You ceased being the Sandy City Fire Marshal sometime in May of 1995?

A. That's right.

Q. On April 26th of 1995, the charges against Ms. Basta had already been filed?

A. Yes.

Q. You were still the Sandy City Fire Marshal on April 26th?

A. Yes.

Q. You were still a witness for the State?

A. Yes.

Q. And the prosecution of Betty. And on April the 26th, you took a trailer from a job site that you were inspecting and doing code enforcement on; is that right?

A. Yes.

Q. And it was a trailer that was being used by a crew that was at the construction site doing some kind of construction?

A. Yes.

Q. You didn't ask their permission before you took the trailer?

A. That's right.

Q. You hooked it up on your truck and essentially drove

away with it?

A. That's right.

Q. On April 28th of 1995, a police officer contacted you about that particular trailer?

A. Yes.

Q. The crew had found you in possession of it and reported it stolen?

A. Yes.

Q. Seen it attached to your truck?

A. Yes.

Q. The police questioned you that day about that trailer; didn't they?

A. Yes.

Q. You told them that you bought the trailer?

A. I did.

Q. You said that you saw it advertised in the classified ads, that it was on display at a restaurant, the Iceberg restaurant in West Jordan; isn't that right?

A. Yes.

Q. You told them that the man was selling the trailer in the classified ads for $1,200?

A. Yes.

Q. And that the trailer was displayed for sale somewhere in the neighborhood of 7200 South and 9th West?

A. That's right.

Q. Now, when you told the police about how you got this trailer initially you --

MR. JONES: Objection, I don't see the relevance of this line of questioning.

MR. MOFFAT: Your Honor, it goes directly to bias.

THE COURT: Counsel, the witness has indicated that he fabricated a story to the police officers.

MR. MOFFAT: Okay.

THE COURT: That's sufficient.

MR. MOFFAT: All right.

Q. (By Mr. Moffat) In addition to fabricating the story to the police officers, Mr. Meldrum, you gave them a fabricated receipt of sale for the trailer; isn't that right?

A. Yes.

Q. And the receipt was dated February 7th, 1995?

A. Yes.

Q. All right. Now, these are police officers questioning you?

A. Sure.

Q. You've been in law enforcement for how long?

A. Since 1979.

Q. 1979. You've been a police officer yourself; haven't you?

A. Yes.

Q. These police officers are questioning you and you

give them false documentation to support your story?

A. Yes.

Q. The receipt said that, "For $1,000 I am selling a 12-foot trailer to Dave Meldrum, no serial number, or title"; is that what it indicates?

A. Something like that.

Q. Would you like to see it?

A. No.

Q. The receipt was signed by Mark Rierton?

A. Right.

Q. This was a complete fabrication; wasn't it?

A. Yes, it was.

Q. By you?

A. Yes.

Q. In an effort to mislead the police about what had actually happened in this case?

A. I suppose that's true, yes.

Q. Now, you were charged with the crime, in the month of May, of theft; isn't that right?

A. That's right.

Q. And that was a third-degree felony?

A. I think so.

Q. And in your experience in law enforcement, third-degree felonies are crimes that are punishable by the possibility of some prison time; isn't that right?

A. Yes.

Q. As for the time that you're charged, this case here is still pending against Betty Basta; isn't it?

A. Uh-huh.

Q. You're still a witness -- is that a "yes"?

A. Yes.

Q. The State is still going to rely on you, in some fashion, to make its case against her?

A. Yes.

Q. The preliminary hearing in Ms. Basta's case had not even been held as of this time that you're charged; isn't that correct?

A. Yes.

Q. You anticipate testifying in that preliminary hearing?

A. Yes.

Q. The preliminary hearing happens in the month of June?

A. Yes.

Q. And you appear at the preliminary hearing and you testify against Betty; don't you?

A. Yes.

Q. In July, you go back to court in your case in Sandy?

A. That's right.

Q. Before Judge Livingston or Fuchs?

A. Livingston, I think.

Q. Livingston? And you go back to court and you're given a deal in your case by the District Attorney's office; isn't that right?

A. I suppose so, yeah.

Q. Now, the District Attorney's office -- this is the Salt Lake District Attorney's office; isn't that right?

A. Yes.

Q. And it's the same governmental entity that Mr. Jones works for?

A. Yes.

Q. It's the same governmental entity that is prosecuting the case against Betty Basta?

A. Yes.

Q. It's the same entity that's relying on you, in some fashion, to prosecute and make its case against Ms. Basta?

A. Yes.

Q. The District Attorney's office gives you a deal and allows you to plead no contest to a class A misdemeanor; is that right?

A. Through my attorney, they did, yes.

Q. That offer was extended to you?

A. Through my attorney, yes.

Q. They offered that deal to your attorney?

A. I had no contact with them whatsoever.

Q. That offer was made to your attorney?
A. That's right.
Q. And the offer was then extended to you?
A. That's right.
Q. That offer did away with the felony charge against you; did it not?
A. It did.
Q. You're no longer facing prison time; isn't that correct?
A. I think so.
Q. Pled to a misdemeanor, no contest; is that right?
A. That's right.
Q. In addition to that, Mr. Meldrum, this plea was -- it was agreed among the parties that the plea would be held by Judge Livingston in abeyance; wasn't it?
A. I have no idea. My attorney handled all of that. I had no contact.
Q. Your attorney discussed the plea with you; didn't he?
A. He did.
Q. He wanted to make sure that in entering the plea that you knew exactly what the plea was; isn't that right?
A. Yes.
Q. And you -- before you entered the plea, you wanted to know everything about the plea because you were going to be

directly affected by it; isn't that right?

A. Yes.

Q. You knew at the time that you entered the plea that the plea was not going to be recorded as a conviction; isn't that right?

A. Yes.

Q. And that the plea -- that means that you would never -- strike that. The plea would be dismissed by the judge and there would be no record at all, if certain things occurred?

A. That's right.

Q. When you testified against Betty at the preliminary hearing, you hadn't had this deal yet; isn't that right?

A. That's right.

Q. They hadn't extended this offer to you?

A. No.

Q. You knew if you testified against her in a way that would help the State make its case, that you might receive some favorable treatment, such as this deal from the District Attorney's office; isn't that right?

A. Counsel, that's ludicrous.

Q. It's ludicrous?

A. It's offensive.

Q. You've been in law enforcement for 16 years?

A. That's right.

Q. You're familiar with the laws?

A. I am.

Q. You're familiar with how cases are screened and filed; aren't you?

A. I am.

Q. You've done that yourself, you screened cases with the District Attorney's office to be filed?

A. Yes.

Q. In your case, you were charged only with the third-degree felony; isn't that right?

A. Yes.

Q. Clearly, Mr. Meldrum, you could have been charged with other counts; isn't that correct?

A. I don't think so.

MR. JONES: How would he know that, Your Honor?

MR. MOFFAT: May I approach, Judge?

THE COURT: Well, Counsel, I'm not persuaded this witness is qualified on the foundation before us at this time, simply because he's been an officer of the law, that he could have been charged with more than what he was charged. We dealt here with what he was charged with and the circumstances underlying. And, therefore, I'm going to sustain the objection that there's no foundation.

Q. (By Mr. Moffat) Mr. Meldrum, you weren't charged with the offense of tampering with evidence?

A. I already told you I was charged with one charge.

Q. So you weren't charged with the charge of tampering with evidence?

A. I was charged with one charge, theft of the trailer.

Q. You're familiar with the charge "tampering with evidence"; are you not?

A. No, not at all.

Q. You've never encountered it in your 15 years of law enforcement?

A. Never.

Q. You weren't charged with the crime of giving false information to a police officer; were you?

A. No.

Q. Clearly, you gave false information to the police?

A. Yes, I did.

Q. Yet you weren't charged with that particular --

MR. JONES: He's answered that, Your Honor.

THE COURT: He has answered that. Sustained.

Q. (By Mr. Moffat) You wouldn't want the District Attorney's office to file those charges against you; would you?

A. At the time that this happened, it was up to the District Attorney's office to do whatever they wanted.

Q. You wouldn't want the District Attorney's office to file tampering with evidence --

MR. JONES: It isn't relevant.

THE COURT: Objection is sustained. Counsel, he's told you what the arrangement was, what he pled to, and the underlying facts regarding that circumstances. And his druthers in the situation are irrelevant, at least at the time of the charge. Objection sustained.

Q. (By Mr. Moffat) You wouldn't want those charges to be filed against you now?

MR. JONES: Judge, that's the same question.

MR. MOFFAT: Judge, his --

THE COURT: The witness may answer that question.

THE WITNESS: I'm sorry, what was the question?

THE COURT: Would you want the charges to be filed against you now?

THE WITNESS: No.

THE COURT: All right.

Q. (By Mr. Moffat) Clearly, they could be filed against you, couldn't they, Mr. Meldrum?

A. I have no idea, I don't think so. This case has been adjudicated.

Q. Isn't it true that you're testifying against Ms. Basta to make sure that something like that doesn't happen in this particular case?

A. Of course that's not true. Again, that's really offensive.

Q. Your plea has been held in abeyance for a year?

A. Yes.

Q. The plea can be dismissed?

A. Yes.

Q. You're to cooperate with the State as part of your plea to make sure that the charges are dismissed?

A. Absolutely not.

Q. It's not true?

A. Absolutely not true.

Q. You see no connection between the deal that you were offered and your testimony in this case, Mr. Meldrum?

A. Your question was whether or not part of the deal was that I was to cooperate with the State.

Q. Do you see any connection Mr. Meldrum --

A. I do not.

Q. -- between your testimony in this case and the deal that you received?

A. None whatsoever.

Q. Do you see any connection, Mr. Meldrum, in respect to your testimony in this case and the charges against you being dismissed outright?

A. Absolutely not.

Q. When the charges are dismissed outright against you, Mr. Meldrum, you will have no record of conviction in your case; isn't that right?

A. Yes.

Q. There will be no record that the case ever happened; isn't that correct?

A. That's correct.

Q. It's a pretty good deal; is that correct, Mr. Meldrum?

A. I thought it was. I thought it was fair.

Q. Mr. Meldrum, you've testified and indicated that you had certain training in the field of fire investigation?

A. Yes.

Q. And you indicated that you had offered certain publications -- or articles for publication?

A. Yes.

Q. Can you please tell me the name of both articles?

A. The first one -- the first one that was written was a public study, and I think that I titled it, "A Public Study of Arson and Public Awareness," or something like that.

Q. When was this article written?

A. It was written in '82.

Q. Where was it published?

A. National Fire Academy.

Q. And the name of the article was "A Public Study of Arson," and what was it?

A. Public Awareness. "Public Awareness of Arson and Fire."

Addendum G

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

* * *

THE STATE OF UTAH,

Plaintiff,

vs.

BETTY BASTA,

Defendant.

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS (Volume IV)

Case No. 951901219 CR

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Friday, November 17, 1995

For the Plaintiff:

ERNEST W. JONES
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
363-7900

For the Defendant:

MARK R. MOFFAT
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
532-5444

ANNA M. BENNETT, C.S.R.
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

intentionally set fire, no accident, and it starts in the family room.

Well, finally, we heard from the Defense expert, and there are a couple of things that I think are troubling about Dave Smith's testimony. Oh, great credentials, great credentials for this man who claims that he investigated more than 6,000 fires. He's paid $2,000 to come in here and testify for the Defense. He only relies on what somebody else has already done to do his investigation. He admitted that some of the experts don't agree that that's the way you investigate. In fact, I put Dave Meldrum back on the stand and I said, "Have you ever heard of such a thing that somebody can reach a conclusion as to cause and origin simply by looking at somebody else's photographs?

Boy, wouldn't that be nice? I wish we could solve all of our crimes by looking at somebody else's photographs.

Mr. Meldrum said, "No, I've never heard of that being done," and Mr. Smith admitted it on the stand that not all of the experts in the field agree that that's the best way to investigate an arson case. Oh, yes, the pictures help, but the best way to investigate arson is to go to the scene and get there, take a look at the fire scene, take a look at the depth of char.

I mean, I thought it was amazing when Mr. Smith told you that he can determine the depth of char by simply

looking at the photographs. Well, Mr. Meldrum said no, you can't do that, and in fact, I read an article to Mr. Smith. I said, "Some of the other experts in the field say you cannot determine the depth of char by simply looking at a photograph," and he acknowledged that. He didn't agree with it, but he said that's the situation.

Well, members of the jury, I submit Mr. Smith is wrong in his analysis of this case and that the other three experts are correct, but again, I say to you, I don't know that you need to get into a struggle trying to decide who do you believe because if you want to set aside all four experts, that testimony of Mr. Durrant, Dave Durrant, is extremely compelling when we start talking about where this fire originated and how it was started.

Just one other thing that I wanted to talk to you about. As you know, there are two charges in this case, one for insurance fraud and the other for the aggravated arson. In reality this is what you would call an all or nothing case. If you conclude that Mrs. Basta set the fire, then simply submitting the proof of loss to the insurance company is fraudulent. In fact, I think Mr. Howard told you that. If she set the fire, would she be entitled to any insurance? He said absolutely not.

If you conclude, on the other hand, though, that she did not set the fire, then submitting the claim is not

Next, the Defense said, well, the reason you can't believe Mr. Meldrum is he's got an interest in the outcome of the case. He does? Did he get $2,000 to come in and testify like Mr. Smith? I mean, here's a man who's no longer in the fire department. He could have just said, hey, forget it, forget it, I'm no longer there, I don't really care, but the fact that Dave Meldrum comes in here and testifies and tells you the same thing that he concluded back in February says something about his integrity. It says something about the man. That was his call to make. That was his conclusion.

THE COURT: Two minutes, Mr. Jones.

MR. JONES: You know, then the Defense start picking on some of the statements in the report. In Mr. Peak's report he puts down that the wall or that the fire originated on or near the west wall. Okay. That's what it says in the report, but if you remember, we specifically asked Mr. Peak, "Mr. Peak, when you say on or near the west wall, are you telling us that the fire started inside that wall in the electrical system?"

He said, "Absolutely not. I'm telling you that the fire started in the area that I've marked here on the diagram."

You know, we're playing a little game here with words, at least the Defense is, trying to, when they try to suggest to you that Mr. Peak concluded that the fire started